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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MKRTCHYAN PROPERTIES, L.P., Plaintiff and Appellant, v. CALIFORNIA FAIR PLAN, Defendant and Respondent.	B284367 (Los Angeles County Super. Ct. No. BC605594)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elizabeth R. Feffer, Judge. Affirmed.

Silverberg Law Corporation, James W. Haines, and Ivetta Avanesov for Plaintiff and Appellant.

Lewis, Brisbois, Bisgaard & Smith, Raul L. Martinez, and Elise D. Klein for Defendant and Respondent.

Defendant insurer California FAIR Plan (FAIR) issued a policy covering a residence purchased by plaintiff Mkrtchyan Properties L.P. (MPLP) for use as a rental property. Before MPLP could rent the residence, it was vandalized several times. MPLP made two claims to FAIR, which paid one at least in part and denied the other entirely. MPLP disputed the handling of those two claims, and sued FAIR for breach of the insurance contract and breach of the implied covenant of good faith and fair dealing. The trial court entered summary judgment against MPLP, finding no triable issues of material fact. We affirm.

FACTUAL BACKGROUND

A. The Insurance Policy

In February 2014, MPLP purchased a residential property on five acres of surrounding land in Murrieta, California. MPLP also purchased insurance coverage for the property from FAIR. As pertinent to this appeal, the policy covered losses from vandalism but not theft. The policy excluded coverage for vandalism damage if the property was vacant for more than 30 consecutive days immediately before the loss. FAIR permits policyholders to purchase a waiver of this vacancy exclusion, but MPLP did not do so. For purposes of the vacancy exclusion, the policy provided that "[a] dwelling being constructed is not considered vacant."

The policy included a "Replacement Cost Endorsement," which provided FAIR would pay the depreciated actual cash value of an insured loss pending completion of repairs to the property. The amount withheld based on depreciation would then be paid upon MPLP providing proof that it had incurred repair costs in excess of the amount held back plus the

deductible. Any claim by MPLP for the replacement cost holdback was contractually required to be made within 12 months. If the policyholder was unable to complete repairs within those 12 months, the policy provided for continuing six-month extensions of the deadline on a showing of good cause.

B. The First Vandalism Loss

On December 4, 2014, while accompanying a sheriff who was evicting prior tenants from the residence, MPLP's general partner Greg Mkrtchyan discovered damage to the dwelling. The property had been used to cultivate and dry marijuana. Graffiti was on multiple surfaces in the house, and walls and flooring were damaged. Kitchen cabinets had been removed and replaced with a stainless steel industrial sink.

MPLP made a claim to FAIR on December 10, 2014. FAIR assigned the claim to a third party adjuster, Craig Burdick. Burdick determined a significant amount of the damage was related to theft, and not covered. For example, electric wiring and an electrical service panel had been removed, as well as the HVAC condenser.

Burdick estimated the cost to repair damage from vandalism was $32,286.26, with a depreciated actual cash value of $19,514.91. After subtracting the $5,000 deductible, FAIR sent MPLP a check for $14,514.91. FAIR separately paid MPLP $6,300, which was Burdick's calculation of lost fair rental value. Burdick calculated this $6,300 figure using a monthly rental rate of $2,100 for three months, which was the amount of time he believed necessary to complete cleaning, painting, and recarpeting the property.

FAIR closed the claim on February 3, 2015. On April 23, 2015, Burdick reminded MPLP of its right to claim the replacement cost holdback (which Burdick calculated as $12,771.35). Burdick sent another reminder on June 1, 2015. MPLP never submitted a claim for the holdback or requested an extension of time in which to complete repairs. As discussed below, MPLP did not raise any concerns about the amounts paid on this loss until more than four months after the claim was closed.

C. The Second Vandalism Loss

After the first vandalism loss and the eviction of the prior tenants in early December 2014, the property remained vacant. The property was then vandalized a second time. Both parties agree the second vandalism incident is not at issue in this appeal.

D. The Third Vandalism Loss

On February 2, 2015, Mkrtchyan went to the property and observed additional damage. MPLP contends someone illegally entered the property to steal copper wire from the residence, and dislodged an upstairs toilet which broke a water supply line. The leak from the broken water line caused extensive damage to the interior of the residence. MPLP provided Burdick an estimate of $139,295.08 to repair the residence.

FAIR denied the claim on March 27, 2015 on the grounds the property had been vacant and unoccupied for more than 30 days by the time this loss occurred, such that the policy's vacancy exclusion applied.

PROCEDURAL BACKGROUND

In the summer of 2015, representatives of MPLP and FAIR exchanged correspondence about the estimate for the first loss, and the denial of coverage for the third loss. With regard to the first loss, MPLP (through counsel) asserted the adjuster's pictures showed graffiti on some of the kitchen cabinets, but there was no payment related to that damage. MPLP also complained the estimate did not include painting baseboards or "resetting lights." With regard to the third loss, MPLP asserted the property was undergoing repairs, and the construction exception to the vacancy exclusion thus applied. FAIR responded by asking MPLP to identify which adjuster photograph purportedly showed graffiti on the kitchen cabinets (as it could not identify one), and to provide information supporting MPLP's claim that repairs were underway during the period implicated by the vacancy exclusion. MPLP did not respond to FAIR's requests for information.

MPLP then sued FAIR in December 2015 for breach of the insurance contract and breach of the implied covenant of good faith and fair dealing. MPLP asserted, without reference to any specific examples, that payment on the first claim was inadequate to repair covered losses to the property. MPLP alleged FAIR denied the claim for the third loss based on inapplicable policy provisions.

FAIR eventually moved for summary judgment, or in the alternative summary adjudication of specific causes of action and claims for damage. In support, FAIR submitted declarations from Burdick, two individuals with FAIR, and a compendium of exhibits. FAIR argued that undisputed facts showed it did not

breach its contractual obligations under the policy, or the implied covenant of good faith and fair dealing. MPLP filed an opposition, arguing triable issues of fact precluded summary judgment. In support, MPLP submitted declarations from its counsel and Mkrtchyan along with exhibits. Both sides objected to targeted portions of the declarations submitted by the other.

The motion was argued on May 18, 2017. The trial court overruled certain objections to the declarations of Burdick, Mkrtchyan, and MPLP's counsel, declined to rule on the remaining objections because they addressed evidence immaterial to the disposition of the motion, and took the matter under submission.

At the final status conference on June 9, 2017, the court orally provided its ruling granting the motion. We do not have a record of the court's oral ruling, as no reporter was present. The minute order indicates the court overruled the evidentiary objections made by MPLP that the court had previously declined to address on materiality grounds. The court modified its ruling on FAIR's objections to the declaration from MPLP's counsel, sustaining all but one of those objections. The court did not alter its ruling on the four objections it previously sustained to the Mkrtchyan declaration. With regard to the two remaining objections to Mkrtchyan's declaration, which the court previously declined to address on materiality grounds, the court sustained one and overruled the other. The court ordered FAIR to prepare a proposed written order for submission to the court.

The written order was filed July 14, 2017. The court granted summary adjudication on all identified breach of contract issues related to the first and third vandalism claims. In light of

its grant of summary adjudication on the breach of contract cause of action, the court granted summary adjudication on the bad faith cause of action because there was no triable issue that policy benefits were wrongfully withheld. Because summary adjudication was granted on all issues, the court granted summary judgment. As part of its written order, the trial court sustained all of FAIR's objections to the Mkrtchyan declaration, including the one objection it indicated on June 7, 2017 was overruled.

After judgment was entered against it, MPLP timely appealed.

DISCUSSION

"We review a grant of summary judgment de novo," and decide "independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law." (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.) A court must grant summary judgment if the papers submitted show there is no triable issue as to any material fact. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 843 [citing Code of Civ. Proc., section 437c, subd. (c)] (*Aguilar*).) A party opposing summary judgment shall, where appropriate, present evidence including "affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice" must or may "be taken." (Code Civ. Proc., § 437c, subd. (b)(2).)

"Supporting and opposing affidavits or declarations shall be made by any person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations." (Code Civ. Proc., § 437c, subd. (d).) Evidentiary

objections may be made if they fail to comply with this standard. (*Ibid*.) In ruling on a summary judgment motion, the court must consider all of the admissible evidence submitted and " 'all' of the 'inferences' reasonably drawn therefrom," and must view the evidence and inferences in the light most favorable to the party opposing the motion. (*Aguilar*, *supra*, 25 Cal.4th at p. 843.)

A. The Trial Court's Evidentiary Rulings

MPLP spends substantial time arguing the trial court erred in sustaining FAIR's objections to its evidence. MPLP first asserts it was improper for the court to modify evidentiary rulings made before entry of the written order granting summary judgment. MPLP argues next the court's initial determination at oral argument that it did not need to rule on certain objections meant those objections were waived, and the court therefore acted improperly when it sustained objections that were waived. MPLP finally claims that regardless of these procedural issues, whether reviewed de novo or for abuse of discretion, objections to its evidence were improperly sustained.

1. The Trial Court Had Authority to Revise its Rulings

We reject MPLP's claim the court lacked authority to modify its evidentiary rulings as between the time of the court's initial rulings at the May 18, 2017 oral argument and the ultimate written ruling. Courts have broad inherent authority to reconsider prior interim rulings on their own motion. (*LeFrancois v. Goel* (2005) 35 Cal.4th 1094, 1096–1097 (*LeFrancois*).) " 'A court may change its ruling until such time as the ruling is reduced to writing and becomes the [final] order of

the court.' " (*Silverado Modjeska Recreation & Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 300.)

This broad authority is particularly apt here, where the initial evidentiary rulings were followed by the summary judgment motion being taken under submission. In taking the motion under submission, the court was still in the process of determining how it would dispose of the motion, and therefore what evidence would be material to its disposition. The court accordingly retained flexibility to change its initial rulings if it determined certain evidence was in fact material.

Furthermore, to the extent the court ultimately sustained objections it initially overruled at the oral argument, our review indicates it was the initial rulings that were incorrect. The court initially overruled hearsay and foundation objections to a Riverside Sheriff's Department report, and business records from FAIR and Burdick that were attached to a declaration from MPLP's attorney. Overruling those objections was error. The attorney lacked the personal knowledge necessary to authenticate those documents or lay a business records foundation for them, and they were therefore inadmissible. (*DiCola v. White Brothers Performance Products, Inc*. (2008) 158 Cal.App.4th 666, 680–681.) Courts have authority to correct such mistakes on their own motion, and should so correct where appropriate, which the court did by later properly sustaining objections to those documents. (*LeFrancois*, *supra*, 35 Cal.4th at p. 105 [" ' "A court could not operate successfully under the requirement of infallibility in its interim rulings. Miscarriage of

justice results where a court is unable to correct its own perceived legal errors." ' "].)[1]

For similar reasons, we reject MPLP's assertion that any objections not ruled upon at oral argument were waived, and the evidence irretrievably admitted thereafter. First, the trial court did ultimately rule on all the objections, and as just explained its earlier decision that certain evidence was immaterial did not prevent it from reconsidering that decision after taking the motion under submission, and before its final ruling. Second, the written evidentiary objections made by both parties preserved their respective objections. (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 517.) To the extent the court did not rule on the objections at the oral argument, those objections were not waived and continued to be preserved. (*Ibid.*)[2]

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[1] MPLP claims the court's evidentiary rulings on its counsel's declaration were inconsistent, because the court overruled an objection to a boilerplate statement that the declarant had personal knowledge and could testify competently to the facts in the declaration, while sustaining objections to the specific documents for which counsel sought to provide an evidentiary foundation. We perceive no such inconsistency. The boilerplate recital was worth whatever it was worth, and came into evidence. That does not mean it provided an adequate basis, in the absence of any additional facts, to demonstrate counsel's personal knowledge and competency as to the particular exhibits that were excluded. (See *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 692 fn.1; Evid. Code, § 702.)

[2] MPLP relies on language from a sister Court of Appeal case stating that evidentiary objections not ruled upon in a tentative ruling are deemed waived, and that a trial court errs if it later

Nor do we agree with MPLP that the difference in rulings on one of the objections to the Mkrtchyan declaration as between the June 9, 2017 minute order (overruling the objection) and the July 14, 2017 written order (sustaining the objection) was inherently erroneous. When a trial court's minute order expressly indicates a written order is to be prepared, as was the case here, the written order is the effective order. (*In Re Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1170.) Because only the written order was effective, there was no error in filing a written order that differed from the minute order on this one objection.[3]

2. De Novo v. Abuse of Discretion

As MPLP notes, post-*Reid* it is unclear whether the standard of review for evidentiary rulings made in connection with a summary judgment motion is de novo or abuse of discretion. (*In Re Automobile Antitrust Cases I & II* (2016) 1 Cal.App.5th 127, 141 [collecting cases].) We need not resolve this issue, as our conclusions would be the same under either standard of review.

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sustains those objections in a final written order. (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 255.) *Nazir* was decided before *Reid*, and subsequent courts have read *Reid* (as we do) to disapprove *Nazir*'s "deemed waived" language. (E.g., *Serri v Santa Clara University* (2014) 226 Cal.App.4th 830, 853, fn. 12.)

[3] MPLP filed an objection pursuant to California Rules of Court, rule 3.1312 to the proposed order prepared by FAIR, but that objection said nothing about a variance in evidentiary rulings between the minute order and the proposed order.

MPLP does not claim error in the overruling of its objections, and in any event we see none. FAIR's objections to the attachments to MPLP's attorney declaration were well taken, and properly sustained. As explained above, the attorney did not have the personal knowledge necessary to authenticate a report from the Riverside Sheriff's Department, or business records from FAIR and Burdick.[4] As we discuss below where relevant, the objections to Mkrtchyan's declaration were also properly sustained, and in any event the objected-to portions were insufficient to create a triable issue of material fact.

B. There was No Triable Issue of Material Fact on the First Vandalism Loss

The trial court found no triable issue on three summary adjudication breach of contract issues related to the first vandalism claim, specifically that FAIR did not breach the insurance policy: (1) when determining the cost of repair, (2) when it paid the actual cash value of the cost to repair the damage, and (3) when it paid the fair rental value claim. We discuss each of these issues below.

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[4] The only other document MPLP's attorney sought to admit was email correspondence sent by another lawyer at her firm to FAIR. Although her declaration lacked sufficient detail to confirm, counsel arguably had sufficient knowledge to authenticate this document. Even if the objection to this document was improperly sustained, the identical email chain was authenticated and admitted as part of FAIR's exhibits, and thus before the court when it decided the motion.

1. The Cost of Repair

It was undisputed that Burdick estimated the cost to repair the first vandalism loss was $32,286.26, with an actual cash (depreciated) value of $19,514.91. MPLP contends this amount was inadequate because it did not include repair of certain graffiti damage as well as items required when a room is repaired and repainted. MPLP further contends the amount was inadequate because there was a triable issue of fact regarding whether the loss of certain flooring and cabinetry resulted from vandalism as opposed to theft.

a. MPLP Submitted No Evidence of Missing Repair Costs

In its opposition and separate statement, MPLP asserted that the adjuster's pictures showed graffiti damage to kitchen cabinets, and the estimate did not include payment for this covered damage. MPLP also asserted the estimate did not include payment for "painting the baseboards, resetting the lights along with other items that are required when a room is repaired and painted."

In support of its claim of graffiti damage to the kitchen cabinetry, MPLP relied on an exhibit to its counsel's declaration containing pictures taken by Burdick. As noted above, counsel did not have foundation to authenticate those pictures, and FAIR's objection to this evidence was properly sustained. That being said, the photographs attached to counsel's declaration were duplicative of pictures admitted in connection with Burdick's declaration, so the photographs at issue were in evidence. The more fundamental issue is that MPLP simply asserts graffiti damage to kitchen cabinetry and seeks to support

that assertion with a general reference to the entire compendium of photographs (of which there are 140), failing to identify which (if any) picture supports its claim. This failure is not unique to this appeal—MPLP failed to respond to a prelitigation request from FAIR to identify which picture(s) showed this claimed damage, nor did MPLP identify the particular photograph(s) that purportedly show this damage in its separate statement or elsewhere to the trial court. Our independent review of those photographs fails to identify any that support MPLP's claim, as the pictures show where kitchen cabinets were removed but not remaining cabinets tagged with graffiti. Accordingly, MPLP did not identify evidence to indicate there was a triable issue of material fact regarding uncompensated graffiti damage to kitchen cabinets.

MPLP's contention that the estimate did not include payment for "painting the baseboards, resetting the lights along with other items that are required when a room is repaired and painted" is similarly vague and nonspecific. MPLP submitted no evidence the baseboards needed painting, or that lights needed to be "reset" (whatever that may mean—MPLP does not say). MPLP instead simply pointed out that these items were not included in Burdick's estimate. In the absence of any evidence such work was necessary to repair vandalism damage, there was no triable issue of fact. Nor does a claim that "other items" were required to repair the vandalism damage and were not included, without any more specificity or evidentiary support, raise a triable issue of fact.[5]

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[5] MPLP additionally asserts the court erroneously sustained a hearsay objection to a statement in Mkrtchyan's declaration

b. Losses Excluded as Theft

The parties do not dispute that flooring and kitchen cabinets were removed from the property. MPLP claims there was a triable issue of fact that the loss of these items was caused by vandalism, and not theft. "When an issue of coverage exists, the burden is on the insured to prove facts establishing that the claimed loss falls within the coverage provided by the policy's insuring clause." (*MRI Healthcare Center of Glendale, Inc. v. State Farm General Ins. Co.* (2010) 187 Cal.App.4th 766, 777 (*MRI*).)

The only evidence MPLP offered to establish that the missing flooring and cabinets fell within the vandalism coverage was a single sentence in Mkrtchyan's declaration that FAIR "refused to pay for the damaged floors and kitchen cabinets even though the floors and cabinets had been vandalized and torn out and the loss was covered" The trial court found this statement was inadmissible as speculative, lacking in foundation and conclusory.

This statement was in fact conclusory and lacking in foundation, and properly stricken. MPLP provided no facts to explain Mkrtchyan's bald assertion that the removal of the items from the property was due to vandalism as opposed to theft. Accordingly, even if Mkrtchyan's statement is considered it does not create a triable issue of fact. (*MRI*, *supra*, 187 Cal.App.4th 766, 777 ["An opposition to summary judgment will be 'deemed

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that "I was advised by my contractor that the amount The FAIR Plan paid for the first vandalism was not nearly enough to cover the cost of repairing the property." This statement was clearly hearsay, and properly excluded. (Evid. Code, § 1200.)

insufficient when it is essentially conclusory, argumentative, or based on conjecture and speculation.' "].)

2. The Replacement Cost Holdback

In granting summary adjudication that FAIR did not breach the insurance contract in its handling of the replacement cost holdback, the trial court found MPLP submitted no evidence that a claim for the replacement cost holdback was made. MPLP argues there was a triable issue of fact, because the court improperly sustained a relevancy objection to a statement in Mkrtchyan's declaration that a claim for the holdback was not made because the damage was so extensive it could not be repaired within the timeframe available to claim the holdback.

We find no error in the evidentiary ruling, and even if this statement was considered it would not create a triable issue of material fact (which is another way of saying that it is not relevant). The contractual requirements regarding payment of the holdback were plain, understandable and unambiguous. FAIR was accordingly entitled to enforce that contractual provision. (*Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 749.) The reason for MPLP's noncompliance with those contractual provisions was not relevant to whether FAIR breached its contractual obligations. FAIR's obligation was triggered when proof of repair was submitted to it. It was undisputed MPLP did not submit that proof, and that MPLP never applied for an extension of time as permitted by the contract.

3. Fair Market Rental Value

Nor did the court err in finding no triable issues of material fact regarding the fair market rental value payment. In opposing

the motion, MPLP disputed only the amount of the monthly rent and not the length of time the property would be unavailable for rental. The only evidence MPLP submitted on the purported higher rental value was two sentences in Mktrtchyan's declaration that "In my opinion, $2,100 a month was less than the fair rental value. I have experience in real estate and renting properties. In January 2015, the fair rental value of the property was $3,000." The court sustained an objection to this statement based on lack of foundation, among other grounds.

The exclusion of this evidence was not error. While we must liberally construe an opposing party's evidence, the declaration failed to provide any basis from which one could conclude Mkrtchyan had foundation to competently opine on the Murrieta rental market. It was accordingly inadmissible, and insufficient to raise a triable issue of fact. (*Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1487; see also Code Civ. Proc., § 437c, subd. (d) [opposing declarations "shall show affirmatively that the affiant is competent to testify to the matters stated"].)

C. There Was No Triable Issue of Fact on the Third Vandalism Loss

It was undisputed the property was vacant for more than 30 days before the third vandalism loss. FAIR denied the claim for that loss based on the policy's exclusion of vandalism coverage when the property "has been vacant for more than 30 consecutive days immediately before the loss."

In arguing summary adjudication was improvidently granted against it on the claim for the third loss, MPLP relies on the policy language providing a property "being constructed" is

not considered vacant, and claims there was a triable issue of fact regarding whether the dwelling was "being constructed." MPLP further argues there was a triable issue of fact regarding the impossibility of the property being occupied for more than 30 consecutive days before the third vandalism loss such that the vacancy exclusion should not be enforced. MPLP additionally asserts the vacancy exclusion should not apply because FAIR failed to notify MPLP of the opportunity to acquire vacancy coverage until it was too late.

1. The Construction Exception Required Substantial Continuing Activities

In *TRB Investment, Inc. v. Fireman's Fund Ins. Co.* (2006) 40 Cal.4th 19, the Supreme Court interpreted a vacancy exclusion for structures "under construction" similar to the one at issue here. The Supreme Court noted that vacancy exclusions are included in insurance policies because vacant buildings face an increased risk of property crime, including vandalism, and thus impact the insurer's risk assessment and related premium decision. (*Id.* at pp. 29–30.) A construction exception to the vacancy exclusion recognizes that when there is substantial construction activity on the premises, the structure is regularly occupied and therefore the risk of loss is more like that of an occupied building. (*Id.* at p. 30.) Accordingly, "the proper inquiry for determining whether a building is 'under construction' for purposes of defining an exception to the vacancy exclusion is whether the building project, however characterized, results in 'substantial continuing activities' by persons associated with the project at the premises during the relevant time period." (*Ibid.*)

MPLP's declarations in opposition to the summary judgment motion said nothing about construction activity. MPLP instead suggests one of its interrogatory responses stating that sometime between December 4, 2014 and February 1, 2015 Mkrtchyan "started clearing out the outside of the property and took out the carpeting inside" created a triable issue of material fact that the property was being constructed.

We disagree. This discovery response was too vague and equivocal to create a triable issue on whether there was substantial continuing construction activity. A triable issue of material fact exists "if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar*, *supra*, 25 Cal.4th at p. 850.) Equivocal evidence is not sufficient. (*Jane D. v. Ordinary Mutual* (1995) 32 Cal.App.4th 643, 654.) The interrogatory response did not indicate when Mkrtchyan performed these actions, how frequently or infrequently he was at the property to perform them, or even whether they were within the critical 30 plus days before the claimed loss on February 2, 2015 (as opposed to sometime earlier between December 4, 2014 and January 2, 2015). Filling in such gaps would require us to speculate, and "[s]uch speculation is impermissible . . . and is grounds for granting summary judgment." (*Doe v. Salesian Society* (2008) 159 Cal.App.4th 474, 481.)[6]

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[6] Given the interrogatory response, MPLP also claims the court erred in finding MPLP admitted that it had not commenced repairs following the first vandalism claim. The court's finding was based on MPLP's statements elsewhere in its interrogatory

2. Performance Was Not Impossible

MPLP argues there is a triable issue of fact concerning whether it was impossible for the residence to be occupied, such that it had a contractual defense of impossibility to enforcement of the vacancy exclusion. In making this argument, MPLP cites no legal authority, and the test is stiffer than it portrays. To excuse compliance with a contractual term, "the impossibility of performance must attach to the nature of the thing to be done and not to the inability of the obligor to do it." (*Hensler v. City of Los Angeles* (1954) 124 Cal.App.2d 71, 83 (*Hensler*).) Impossibility means not only strict impossibility, but also " 'impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved.' " (*Oosten v. Hay Haulers etc. Union* (1955) 45 Cal.2d 784, 788; see also *Board of Supervisors v. McMahon* (1990) 219 Cal.App.3d 286, 299-300.)

MPLP claims the property was uninhabitable after the first vandalism, and that it was impossible to have repaired the damage in time for the residence to have been occupied. MPLP submitted no evidence in support of these contentions, instead relying on Burdick's determination that it would take three months from the date of loss to repair the property when

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responses that FAIR's claim check did not arrive until after the third vandalism loss and MPLP "was waiting on [FAIR]'s check to begin construction," and "could not begin repairs until it received [FAIR]'s check." We take MPLP's point that its response indicating Mkrtchyan started to clear out the outside of the property and took out the carpeting indicated some work began before the third loss, but MPLP's other interrogatory responses reinforce the lack of evidence there was substantial continuous construction activity during the 30 days leading up the third vandalism, which is the material issue.

calculating payment of lost fair rental value. This evidence did not create a triable issue of fact regarding impossibility. Lost rental value concerns whether the property could be rented out—not whether it was impossible that construction could commence, a caretaker (as opposed to a tenant) could reside on the property, or some other frequent and continuous presence was possible such that the dwelling would not be considered vacant. Indeed, in calculating lost rental income, Burdick's estimate presumed that construction would commence immediately, which would have triggered the construction exception and made the vacancy exclusion inapplicable.

Recognizing this problem with its reliance on Burdick's statement, MPLP asserts it lacked funds with which to repair the property until it received FAIR's check in February 2015. While MPLP's interrogatory responses generally stated it was waiting on a check from FAIR to begin construction and could not start until it got that check, Mkrtchyan's declaration stated he was able to finance necessary repairs to the property without further payment from FAIR. Accepting the interrogatory responses as we must, they fail to create a triable issue of fact on impossibility because they go only to the ability of MPLP to perform (which does not demonstrate impossibility) and not the impossibility of repairs being made (which could demonstrate impossibility). (*Hensler*, 124 Cal.App.2d at p. 83.)

3. FAIR Had No Obligation to Notify MPLP That It Could Acquire Vacancy Coverage

MPLP finally argues there were triable issues on the third vandalism loss because FAIR failed to notify MPLP of the opportunity to purchase additional coverage waiving the vacancy

exclusion. MPLP points to no evidence, and the record contains none, indicating an agreement between FAIR and MPLP where FAIR assumed an obligation to advise on appropriate coverage. In the absence of such evidence, an insurer does not owe a duty to advise an insured on coverage options. (*Paper Savers, Inc. v. Nacsa* (1996) 51 Cal.App.4th 1090, 1096 [collecting cases].) Rather, the onus is squarely on the insured to identify the insurance it requires. (*Ibid.*) Accordingly, even if FAIR failed to notify MPLP that vacancy coverage was available, FAIR breached no duty to MPLP.

D. Summary Adjudication on the Remaining Issues

A breach of contract is a necessary prerequisite to a bad faith claim. (*Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1071–1072.) Because summary adjudication in favor of FAIR was proper on the breach of contract cause of action, MPLP's cause of action for breach of the implied covenant of good faith and fair dealing also fails. Summary adjudication was properly granted as to the bad faith cause of action and related claims for damages.

As summary adjudication was properly granted on both causes of action, the court properly entered summary judgment against MPLP.

DISPOSITION

The judgment is affirmed. Respondent California FAIR Plan is to recover its costs on appeal.

NOT TO BE PUBLISHED

WEINGART, J.*

We concur:

ROTHSCHILD, P. J.

CHANEY, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.